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COURT OF CRIMINAL APPEALS
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TEXAS COURT OF CRIMINAL APPEALS

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COURT OF CRIMINAL APPEALS
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No. PD-0847-20
No. PD-0848-20

Stoyan K. Anastassov, Appellant,
v.
State of Texas, Appellee

On Discretionary Review from the Fifth Court of Appeals
Nos. 05-19-00396-CR & 05-19-00397-CR

On Appeal from the 292nd District Court, Dallas County
Nos. F15-50349 & F15-50350

Petition for Discretionary Review

Michael Mowla
P.O. Box 868
Cedar Hill, TX 75106
Phone: 972-795-2401
Fax: 972-692-6636
michael@mowlalaw.com
Texas Bar No. 24048680
Attorney for Anastassov

If the Petition is granted, oral argument is requested

I. Identity of Parties, Counsel, and Judges

Stoyan K. Anastassov, Appellant

Thomas Pappas, attorney for Appellant at trial

Cally Brown, attorney for Appellant at trial

State of Texas, Appellee

John Cruezot, Dallas County District Attorney

Craig Watkins, Dallas County District Attorney (indictment)

Faith Johnson, Dallas County District Attorney (pretrial)

Brandie Wade, Dallas County Assistant District Attorney

Patrick Capetillo, Dallas County Assistant District Attorney

Delayna Griffin, Dallas County Assistant District Attorney

Judge Brandon Birmingham, 292nd Dist. Ct. Dallas Co.

Judge Ernest White, 194th Dist. Ct. Dallas Co.

Justice Ken Molberg, Fifth Court of Appeals

Justice Erin Nowell, Fifth Court of Appeals

Justice David Schenck, Fifth Court of Appeals

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V. Statement Regarding Oral Argument

Should the Court grant this petition, Attorney for Anastassov requests oral argument. *See* Tex. Rule App. Proc. 68.4(c) (2020). The facts and arguments are presented well in this petition will be presented well in the brief if this petition is granted. However, one ground appears to be one of first impression and is of broad legal significance that affects Texas criminal jurisprudence. Thus, should this Court find its decisional process aided by oral argument, Attorney for Anastassov will be honored to present it.

To the Honorable Judges of the Texas Court of Criminal Appeals:

Appellant Anastassov submits this petition for discretionary review:

VI. Statement of the Case, Procedural History, and Statement of Jurisdiction

This petition for discretionary review ("PDR") requests that this Court review the Memorandum Opinion ("Opinion") and Judgment of the Court of Appeals in *Anastassov v. State*, Nos. 05-19-00396-CR & 05-19-00397-CR, 2020 Tex.App.LEXIS 6409 (Tex.App.-Dallas Aug. 12, 2020) (mem. op.). *See* Appendix. The Opinion affirmed the *Judgment of Conviction by Jury* ("Judgment-396") entered and sentence imposed on February 28, 2019 in *State v. Anastassov*, No. F15-50349 (292nd Dist. Ct. Dallas Co.) (05-19-00396-CR on appeal and PD-0847-20 here) in which Anastassov was convicted of Indecency with a Child by contact under Tex. Penal Code § 21.11(a)(1) (2013) and sentenced to nine years in the Texas Department of Criminal Justice, Corrections Institutions Division ("TDCJ"), and fined $10,000. (RR9.6, 93; CR-396.270-271).[1]

[1]The Clerk's Records are cited as "CR" followed by "396" or "397" (the last three digits of the Court of Appeals cause numbers) or by "Sealed" (for the sealed volume), followed by the page number. The Reporter's Record is cited as "RR" followed by the volume number and the page or exhibit number.

The Opinion also affirmed the *Judgment of Conviction by Jury* ("Judgment-397") entered and sentence imposed on February 28, 2019 in *State v. Anastassov*, No. F15-50350 (292nd Dist. Ct. Dallas Co.) (05-19-00397-CR on appeal and PD-0848-20 in this PDR) in which Anastassov was convicted of Indecency with a Child by contact under Tex. Penal Code § 21.11(a)(1) (2013) and sentenced to three years in TDCJ and fined $10,000. (RR9.6, 93; CR-397.272-273).

On May 27, 2015, in F15-50349 (05-19-00396-CR; PD-0847-20), a grand jury indicted Anastassov for Indecency with a Child by contact under Tex. Penal Code § 21.11(a)(1) (2013): that on or about December 20, 2013, Anastassov unlawfully and with the intent to arouse and gratify the sexual desire Anastassov engaged in sexual contact with S.S.,[2] a child younger than 17 years and not then the spouse of Anastassov, by contact between the hand of the defendant and the genitals of S.S. (CR-396.11). Anastassov pleaded "not guilty" to this charge. (RR4.19).

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[2] Under Tex. Rule App. Proc. 9.10 (2019), *Privacy Protection for Documents Filed in Criminal Cases*, "sensitive data" that must not be stated in filings include the birthdate, a home address, and the name of any person who was a minor at the time the alleged offense was committed. Thus, the complainant is referred to as "S.S."

Also on May 27, 2015, in F15-50350 (05-19-00397-CR; PD-0848-20), a grand jury indicted Anastassov for Indecency with a Child by contact under Tex. Penal Code § 21.11(a)(1) (2013): that on or about December 15, 2013, Anastassov unlawfully and with the intent to arouse and gratify the sexual desire Anastassov engaged in sexual contact with S.S., a child younger than 17 years and not then the spouse of Anastassov, by contact between the hand of Anastassov and the breast of S.S. (CR-397.11). Anastassov pleaded "not guilty" to this charge. (RR4.9).

The indictments were effectively consolidated for trial although the State neglected to file the notice required by Tex. Penal Code § 3.02(b) (2019). Thus, the trial court delivered two jury charges and entered two Judgments. Anastassov files this single PDR because the cases involve identical issues.

On February 19, 2019, trial commenced on both cases. (RR2). After hearing the evidence, the jury convicted Anastassov in both cases as charged in the indictments. (RR9.6; CR-396.269; CR-397.271). After hearing additional evidence, the jury sentenced Anastassov to nine years in TDCJ in F15-50349 (05-19-00396-CR; PD-0847-20) and three years in

TDCJ in F15-50350 (05-19-00397-CR; PD-0848-20). (RR9.6. 93; CR-396.262, 270-271; CR-397.264, 272-273).

Anastassov appealed. On August 12, 2020, the Court of Appeals affirmed both Judgments and sentences. *Anastassov*, 2020 Tex.App.LEXIS 6409. *See* Appendix. This PDR follows. Thus, this Court has jurisdiction over this case.

VII. Grounds for Review

Ground 1: The Court of Appeals erred and should have found that trial court denied a substantial right of Anastassov under Tex. Rule Evid. 404(a), (b)(2); 403; and 402 by permitting the State to use evidence of "other" bad acts that involved legal—consensual—sex with another female (N.H.) as proof he engaged in the conduct alleged by S.S.

- RR4.7-9; RR6.46; RR7.100-104, 108, 112-113; RR8.20-25, 31-33, 48-50, 54-57, 61-66, 72, 88, 101, 104-106.
- CR-396.11, 269-271
- CR-397.11, 272-273

Ground 2: Related to Ground 1, this type of decision on an evidentiary matter should be assessed de novo and not just for abuse of discretion.

Ground 3: The Court of Appeals erred by finding that Anastassov forfeited his right to complain about the content of the jury charge concerning the usefulness of the extraneous evidence—which was admitted to support a finding of guilt by implying that on the occasion in question he had acted upon a perverse proclivity to engage in sex with

underage girls—thus denying his substantial rights to be tried only for the conduct on trial and upon relevant evidence.

- RR4.11, 15-16; RR7.105; RR8.19-22
- CR-397.266

See Tex. Rule App. Proc. 68.4(g) (2020).

VIII. Argument

Ground 1: The Court of Appeals erred and should have found that trial court denied a substantial right of Anastassov under Tex. Rule Evid. 404(a), (b)(2); 403; and 402 by permitting the State to use evidence of "other" bad acts that involved legal—consensual—sex with another female (N.H.) as proof he engaged in the conduct alleged by S.S.

In two cases joined together, Anastassov was found guilty by a jury of two types of Indecency with a Child ("S.S") based on indictments alleging that during the same incident he had touched her breast and genitalia through her clothing while they were seated on a sofa in the girl's home during a Christmas Eve party to which he had been invited by the girl's parents. However, during the guilt-innocence phase, after resting the State—supposedly in rebuttal—also presented evidence that in early 2006, Anastassov allegedly engaged in consensual sex acts with N.H.—another tennis student—shortly before and after her 18th birthday, but while he was married. (RR7.100-104, 112-113; RR8.31-33).

This Court should take the opportunity presented to clarify that evidence of **sexual behavior in general**—that is **not** itself illegal—is inadmissible under Tex. Rule Evid. 404(b)(2). These alleged extraneous bad acts against N.H. were admitted under the guise of Tex. Rule Evid.

404(b)(2) (2019), which allows such evidence to be admitted to prove motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident. The relevant criteria in determining whether evidence of extraneous bad conduct should be admitted include: (1) how compellingly the extraneous offense evidence serves to make a fact of consequence more or less probable—a factor that is related to the strength of the evidence presented by the prosecution to show that the defendant in fact committed the extraneous offense); (2) the potential the evidence has to impress the jury in some irrational but indelible way; and (3) the force of the State's need for this evidence to prove a fact of consequence—what other probative evidence is available to help establish this fact, and is this fact related to an issue in dispute). *Mozon v. State*, 991 S.W.2d 841, 847 (Tex.Crim.App. 1999); *see also* *Montgomery v. State*, 810 S.W.2d 372, 392-393 (Tex.Crim.App. 1991).

Under these criteria, the Court of Appeals erred in approving of the trial court's decision to allow N.H. to testify about her consensual—and legal—sexual conduct with Anastassov as though it tended to prove something addressed in Tex. Rule Evid. 404(b)(2) or to rebut a defensive theory or correct a false impression. As a matter of logic, his touching of

N.H.'s private years earlier—in a legal relationship –has **no** tendency to make S.S.'s claim any more probable in any respect. *See* Tex. Rule Evid. 401(a) (2019) and *Henley v. State*, 493 S.W.3d 77, 99 (Tex.Crim.App. 2016) (Evidence is relevant and generally admissible if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence"); and Tex. Rule Evid. 402 (2019) ("irrelevant evidence is not admissible"). Thus, its probative value was obviously outweighed by a danger of unfair prejudice, confusing the issues, and misleading the jury by implying the account of S.S. was more likely to be truthful.

This case is unlike *Bass v. State*, 270 S.W.3d 557, 562-563 (Tex.Crim.App. 2008), because Anastassov's conduct with N.H. did **not** involve a similar **offense**. The Opinion cites *Bass* on page 14 for the proposition that the trial court's decision to allow Rule 404(b)(2)-evidence was acceptable because the defendant sexually assaulted other girls in the church office. However, this is misleading. In *Bass*, at the time of the alleged collateral crimes, the 404(b)(2)-witnesses, J.P. and R.C., were five and 11 years old, respectively. Having sexual contact with girls ages give

and 11 is a crime. Having **consensual sexual contact** with a 17-18-year-old as Anastassov allegedly did while he was married—while morally repugnant in the opinion of some—is **not** a crime.

Anastassov's relationship with N.H. said **nothing** about how or why he **might** be inclined to abuse 13¾-year-old S.S. The requisite nexus was **not** shown. It was **not** enough that N.H. was also one of Anastassov's tennis students within a similar period or that he had touched the private body parts of N.H. There was **no** criminal abuse of N.H. involved, as she acknowledged willing participation in sex acts with Anastassov. While they happened to meet because of his expertise in tennis—as would occur with S.S.—this had **no** known relevance to the development of their relationship. And the dynamics at work in his interactions would vary considerably between student to student and over time.

The necessary connective tissue between the two events was **not** shown, yet great harm occurred. "[B]ecause the evidence carried little probative value, it would tend to impress upon the jury the notion that appellant acted in conformity with his character, an impression the law seeks to avoid" and "evidence of sexually related misconduct is inherently inflammatory." *Reyes v. State*, 69 S.W.3d 725, 743 (Tex.App.-Corpus

Christi 2002, pet. ref.). The extraneous conduct was offered as showing a pedophilic propensity—a relevance it did **not** have.

This Court has held that alleged extraneous offenses "may not be received into evidence unless and until there is a clear showing that: "(1) the evidence of the extraneous offense is material, i.e., going to an element of the offense charged in the indictment or information, (2) the accused participated in the extraneous transaction being offered into evidence, and (3) the relevancy to a material issue outweighs its inflammatory or prejudicial potential." *McCann v. State*, 606 S.W.2d 897, 901 (Tex.Crim.App. [Panel Op.] 1980), *holding modified by Harrell v. State*, 884 S.W.2d 154 (Tex.Crim.App. 1994) (en banc) (clarification of the "clear proof" standard).

That Anastassov had a relationship with N.H. had **no** logical tendency to make a fact of consequence concerning what Anastassov may have done to S.S. more or less probable. Tex. Rule Evid. 401(a) (2019); *Montgomery*, 810 S.W.2d at 391 ("Where the appellate court can say with confidence that by no reasonable perception of common experience can it be concluded that proffered evidence has a tendency to make the existence of a fact of consequence more or less probable than it would

otherwise be, then it can be said the trial court abused its discretion to admit that evidence.").

Moreover, engaging in the conduct as described by S.S. would leave **no** doubt about the actor's intent. The circumstances of Christmas Eve, champagne, seating close together in private, and the alleged prefatory "nasty" conversation mentioned on page 3, fn3 of the Opinion could alone prove the intent element. Thus, there was **no** need for the jury to hear about N.H.

In *Castillo v. State*, 910 S.W.2d 124 (Tex.App.-El Paso 1995, pet. ref.), the trial court admitted evidence that Castillo may have sexually abused other girls because it was "relevant as probative of Appellant's intent to arouse or gratify his sexual desires." *Id.* at 126. The State argued that Castillo's intent was **not** inferable from the act against the complainant itself, and further argued that the extraneous-offense evidence had relevance apart from character conformity in that it tends to show that Castillo engaged in the conduct with the requisite intent to arouse or gratify his sexual desire. *Id.* at 128. However, the court of appeals found that the State had **no** compelling need for the extraneous-offense evidence since Castillo's intent was inferable from the testimony

of the complainant. *Id*. "We find that the intent to arouse sexual desire can be inferred from the act itself and Appellant's subsequent behavior." *Id*. And while the evidence may have been relevant, "it (had) only minimal probative value and (was) inherently inflammatory. Id.; *citing* *Montgomery*, 810 S.W.2d at 397. Thus, the court of appeals found that the trial court abused its discretion in failing to exclude it under Tex. Rule Evid. 403 (2019) and also found that Castillo was harmed. *Id*. *See also* *Ortega v. State*, 626 S.W.2d 746, 749 (Tex.Crim.App. 1981) (When the required intent can be inferred from the act itself, and the defendant puts on no evidence to rebut the inference, intent cannot be said to be a contested issue").

In *Saenz v. State*, 843 S.W.2d 24, 28 (Tex.Crim.App. 1992), this Court observed that a connection between two events **cannot** be made by innuendo, and such evidence would have a low probative value and should **not** be admitted (the probative value of the appellant's possession of "marked" money was low because the State failed to connect the appellant to a drug sale. The "connection" was made by way of innuendo since the appellant possessed the "marked" money, which was somehow related to cocaine that was recovered from parts unknown. Such

innuendo evidence is "quite tenuous" and is **not** probative of whether the appellant intentionally or knowingly possessed the cocaine.); *see also* *Gilbert v. State*, 808 S.W.2d 467, 472 (Tex.Crim.App. 1991) ("trial court discretion does not translate into license to admit evidence that is patently irrelevant").

This Court did **not** review the decision in *Hill v. State*, Nos. 09-19-00292/293/294/295/296-CR, 2020 Tex.App.LEXIS 5878 (Tex.App.-Beaumont July 29, 2020, no pet.) (mem. op.). In *Hill*, Hill was convicted of Indecency with a Child by exposure and sexual contact. *Id.* at *1. J.N.—the Rule 404(b)(2) witness—was Hill's **adopted sister**. *Id.* at *7. When J.N. was 17, Hill entered her bedroom while she was in bed, pulled off her covers, touched her breast, and masturbated over her while he was standing on the side of her bed. *Id.* at *7. In another incident around the same time, Hill digitally penetrated J.N.'s vagina. *Id.* The trial court admitted this evidence with the instruction that the jury could consider this extraneous-offense evidence "in determining the motive, opportunity, intent, knowledge, and identity of the Defendant." *Id.* The court of appeals affirmed, finding that the extraneous-offense evidence was relevant to show intent. *Id.*

Importantly, although not directly addressed by the court of appeals, although J.N. was 17, Hill committed a felony because under Tex. Penal Code § 25.02 (2020) (Prohibited Sexual Conduct), deviate sexual intercourse with another person the actor knows to be his sister "of the whole or half blood or by adoption" is prohibited. But if **no** crime is committed by Anastassov against N.H., the evidence should not have been admitted.

This is all the more reason that this Court should take the opportunity presented to clarify that evidence of **sexual behavior in general**—that is **not** itself illegal—is inadmissible under Tex. Rule Evid. 404(b)(2).

This tenet was the reason for enactment of a limited rule of special admissibility in Tex. Code Crim. Proc. Art. 38.37 § 2(b) (2020). The HRO bill analysis of the purpose of S.B. 12 correctly noted that—before the statute was amended—under the **existing** law "extraneous offenses either have to be connected to the same child victim or, under the rules of evidence, other offenses **must** have some link to the current offense, such as motive or opportunity." (emphasis added). House Comm. on Criminal Procedure Reform, Bill Analysis, Tex. S.B. 12, 83rd Leg., R.S.

2013, p. 6, *available at* https://hro.house.texas.gov/pdf/ba83r/sb0012.pdf#navpanes=0. As explained in *Kirk v. State*, No. 05-19-00768-CR, 2020 Tex.App.LEXIS 7789, *13 (Tex.App.-Dallas Sept. 28, 2020, no pet. h.) (mem. op.), Art. 38.37 "supersedes application of Rule 404(b), making admissible extraneous offense evidence that Rule 404(b) does not." The court of appeals explained that Art. 38.37 "allows the jury to consider that evidence's bearing on 'relevant matters,' including the state of mind of the defendant and child," their "previous and subsequent relationship...", and the character of the defendant and acts performed in conformity with the character of the defendant. *Id.* But even Art. 38.37 does **not** allow admission of extraneous evidence of a sexual nature that is **legal**—however morally objectionable.

A factual nexus must be shown in order to demonstrate the relevance of other "bad act" evidence to support any greater belief about the crime charged. But there is **no** distinctive signature involved in sexual contact on one occasion versus another. "[T]the similarities are more in the nature of the similarities common to the type of crime itself, rather than similarities peculiar to both offenses involved here." *Reyes*,

69 S.W.3d at 739. And the "tennis student" connection here was meaningless given the difference in the ages of N.H. and S.S. even if the same intent—sexual gratification—existed with respect to each student. There was **no** defensive theory presented by defense counsel of accident or that Anastassov lacked criminal intent. His defense was that S.S. was lying—something that the jury decided was **not** rebutted. Anastassov's relationship with N.H. had no relevance to S.S. and only inflamed the jury.

Nor did Anastassov place his interest in heterosexual sex in doubt. Yet that is the only supposed character trait placed at issue by reference to his conduct regarding N.H. There was **no** "door opened" by some broad statement of good conduct or character relevant to the offenses charged. All that was stated was that with respect to his students, Anastassov had been cognizant of his ethical responsibility. As the Opinion notes on page 5, fn5, Anastassov "testified he 'was always appropriate with his *minor* students' but stated he 'did have an inappropriate relationship with [N.H.].'"

Finally, in its analysis of the factors under *Gigliobianco v. State*, 210 S.W.3d 637, 641-642 (Tex.Crim.App. 2006), the Court of Appeals

erroneously stated that the potential for the jury to reach an improper decision was "lessened" because the trial court had instructed "the jury regarding the **proper** use of the extraneous act evidence." Anastassov, *id*. at *16. (emphasis added). As discussed below, the opposite was true: a vague, overly broad instruction was given.

Anastassov was deprived—without any good reason—of the protections **against** being tried upon his **supposed** bad character or conduct **not** connected or only **nominally** connected with the charged offenses. Anastassov is afforded such protection by cases like *Old Chief v. United States*, 519 U.S. 172, 181 (1997), which prohibits evidence of "prior trouble with the law, specific criminal acts, or ill name among his neighbors" even such evidence "might logically be persuasive that he is by propensity [or method] a probable perpetrator of the crime." The issue is not that the evidence is irrelevant, but that it weighs "too much with the jury" and may persuade the jury "to prejudge one with a bad general record and deny him a fair opportunity to defend against a particular charge." *See also* *Mayes v. State*, 816 S.W.2d 79, 86 (Tex.Crim.App. 1991) ("Evidence of a defendant's bad character traits possesses such a devastating impact on a jury's rational disposition towards other

evidence, and is such poor evidence of guilt...") and *Owens v. State*, 827 S.W.2d 911, 915-916 (Tex.Crim.App. 1992) ("because the occurrence of the offense was the only ultimate fact in dispute, any theory of admissibility must naturally stand or fall on whether it legitimately assisted the jury in determining that fact"). *See also, e.g.*, *State v. Ledet*, 345 So.2d 474, 477 (La. 1977) ("[i]n order for a person to be found guilty of a crime, the state must prove beyond a reasonable doubt that the accused committed the crime with which he stands charged, not that he may have committed it because he is a bad man who has committed other offenses on other occasions.").

This is why evidence of extraneous offenses is generally **not** admissible. Tex. Rule Evid. 404(b)(1). No abuse of discretion can ever be found where the "zone of reasonable disagreement" about the scope of the exception to the rule—reason to admit versus omit—is enlarged so as to swallow up the competing notion.

Ground 2: Related to Ground 1, this type of decision on an evidentiary matter should be assessed de novo and not just for abuse of discretion.

Typically, evidentiary rulings are reviewed for an abuse of discretion. *Weatherread v. State*, 15 S.W.3d 540, 542 (Tex.Crim.App. 2000). A trial court abuses its discretion on an evidentiary ruling when its decision "lies outside the zone of reasonable disagreement." *Id*.

However, this issue implicates the Fourteenth Amendment and is so vital to due process that this Court should consider de novo review. Courts have treated the issue as merely requiring a decision about whether the admissibility ruling fell within the zone of reasonable disagreement. Considering that: (1) the prohibition in Rule 404(b)(1) is absolute, and (2) the proponent must suggest a specific **permissible** purpose for admission, it seems that the appellate court should review, as a question of law *de novo*, whether an acceptable purpose was accurately determined. This does **not** involve a need to defer to a trial judge's determination of the credibility of testimony or historical facts—but rather a matter of logic—what is the tendency of the evidence to prove a fact of consequence **aside** from a character trait more probable.

Independent review of such a determination is just as necessary as determinations of probable cause: "if appellate courts are to maintain control of, and to clarify the legal principles" involved. *See* *Ornelas v. United States*, 517 U.S. 690, 697 (1996). Thus, while an "abuse of discretion" standard of review may be appropriate with respect to the trial judge's balancing of interests under Tex. Rule Evid. 403 as held in *Montgomery*, 810 S.W.2d at 378-380 on original submission, it is **not** true with respect to identification of a reason for admission of evidence under Rule 404(b)(2), despite the remarkable turn in Judge Clinton's opinion on the matter on rehearing in *Montgomery*, 810 S.W.2d at 390-391. *See, e.g.,* *State v. McFarland*, 721 S.E.2d 62, 67 (W.Va. 2011) ("we review *de novo* whether the trial court correctly found the evidence was admissible for a legitimate purpose").

<u>Ground 3:</u> The Court of Appeals erred by finding that Anastassov forfeited his right to complain about the content of the jury charge concerning the usefulness of the extraneous evidence—which was admitted to support a finding of guilt by implying that on the occasion in question he had acted upon a perverse proclivity to engage in sex with underage girls—thus denying his substantial rights to be tried only for the conduct on trial and upon relevant evidence.

The Court of Appeals should **not** have found that Anastassov forfeited his right to complain about the content of the charge given to the jury concerning the usefulness of the evidence of extraneous misconduct by him—which was admitted to support a finding of guilt by implying that on the occasion in question he had acted upon a perverse proclivity to engage in sex with underage girls. Anastassov, *id.* at *18-21. Because it did so, Anastassov's substantial rights to be tried only for the conduct on trial and upon relevant evidence were denied.

The Court of Appeals adopted the State's arguments that "even if the limiting instructions listed more [relevant] purposes for S.T.'s and N.H.'s evidence [about extraneous bad conduct] than they should have, the court was not required to provide a more limited instruction because Anastassov failed to request a limiting instruction at the time S.T.'s and N.H.'s evidence was admitted..." Anastassov, *id.* at *18. The Court of

Appeals determined "the trial court was under no duty to provide a limiting instruction to the jury regarding that evidence, and the evidence was [effectively] admitted for all purposes." *Id*. at *19.

In *Taylor v. State*, 920 S.W.2d 319, 323 (Tex.Crim.App. 1996), this Court ruled that instruction should reference the specific purposes for which the evidence is relevant. The correct rule regarding limiting instructions is persuasively stated in *State v. Fortin*, 745 A.2d 509, 518 (N.J. 2000) as:

> [T]he inherently prejudicial nature of such evidence casts doubt on a jury's ability to follow even the most precise limiting instruction [so] the court's instruction should be formulated carefully to explain precisely the permitted and prohibited purposes of the evidence, with sufficient reference to the factual context of the case to enable the jury to comprehend and appreciate the fine distinction to which it is required to adhere. We thus emphasized that a court should not state generally the content of [rule 404(b)(2)].

It should be **immaterial** that Anastassov did **not** request a limiting instruction concerning the evidence of extraneous acts. The evidence should be "used" by the jury only for **relevant** purposes—not for **any** purpose. *Segundo v. State*, 270 S.W.3d 79, 87, fn.14 (Tex.Crim.App. 2008) (the trial court allowed the State to offer evidence of the rape-murder of one woman because the circumstances surrounding that offense were

more similar to those in the present case than the circumstances surrounding the rape-murder another woman: both involved female murder victim found naked in a sexual position; both involved **no** eyewitnesses; both occurred in the north to northwest Fort Worth area, and both involved evidence of sexual assault and manual strangulation).

Thus, when the Rule 404(b)(2)-evidence has little probative value to the charged offenses—as explained in Ground 1—a defendant should have the right to a correct limiting instruction. It would have been better if **no** so-called limiting instruction had been given—but once the trial court chose to give one, it had a duty to correctly instruct the jury and **not** suggest the evidence had relevance to matters "that did not apply here." A trial court has an absolute sua sponte duty to prepare a jury charge that accurately sets out the law applicable to the specific offense charged. *Oursbourn v. State*, 259 S.W.3d 159, 179 (Tex.Crim.App. 2008); Tex. Code Crim. Proc. Art. 36.14 (2019).

A trial court does **not** err by failing to instruct the jury on an issue that was—by virtue of the defendant's silence—inapplicable to the case. *Mendez v. State*, 545 S.W.3d 548, 552 (Tex.Crim.App. 2018). If, however, the trial court undertakes to instruct the jury on a particular

issue, it becomes "law applicable to the case" and is governed by Art. 36.14 regardless of whether the defendant objects or requests something different. *Mendez*, 545 S.W.3d at 552-553.

With the exception of *Irielle v. State*, 441 S.W.3d 868, 880 (Tex.App.-Houston [14th Dist.] 2014, no pet.), the cases cited in the Opinion (*id.* at 20-21) in favor of its ruling involved the **failure to give** a limiting instruction, **not** the giving of an inappropriate instruction. Furthermore, *Irielle* involved the omission of parts of Rule 404(b) from the instruction given, which is different from the inclusion of parts of the rule that do **not** apply. And the true issue was the failure to give a separate instruction concerning "other wrongs or acts" where there was evidence of both other wrongs or bad acts and extraneous offenses. The instruction given was thus not defective in what it said but possibly in what it left unaddressed. That is a different issue too.

This case is more like *Burnett v. State*, 541 S.W.3d 77, 84 (Tex.Crim.App. 2017), where this Court found the charge should **not** have included all of the statutory definition of "intoxicated" in stating the applicable law. *See also Arteaga v. State*, 521 S.W.3d 329, 339 (Tex.Crim.App. 2017), where this Court found that the trial court erred

by referencing the consanguinity statute, "which was not 'law applicable to the case.'" **Not** unlike what happened in *Kirsch v. State*, 357 S.W.3d 645, 652 (Tex.Crim.App. 2012) (there, with respect to the definition of "operate"), the court "impermissibly guided" the jurors' understanding of the limited purpose of the evidence at issue. *See also* *Taylor v. State*, 332 S.W.3d 483, 488 (Tex.Crim.App. 2011) ("a jury charge is erroneous if it presents the jury with a much broader [boundary] than is permitted by law").

In dicta, the Court of Appeals concluded there was **no** egregious harm in offering N.H.'s supposed rebuttal evidence but did so without **any** analysis of the potential harm. It merely stated, "even if [the charge was erroneous], appellant has failed to show that he suffered either 'some' or 'egregious' harm based on this record." Anastassov, *id.* at *19. As Anastassov has demonstrated, there was harm involved and the contrary finding by the Court of Appeals should have **no** effect on the resolution of the issue by this Court.

IX. Conclusion

The Court of Appeals erred by affirming the Judgments and sentences, and decided an important question of state or federal law: (1) that has **not** been but should be settled by this Court; and (2) in a way that conflicts with the applicable decisions of this Court and the Supreme Court. *See* Tex. Rule App. Proc. 66.3(b) & (c) (2020). The Opinion may also conflict with another court of appeals' decision on the same issues and so departed from the accepted and usual course of judicial proceedings with regards to Ground 1 that this Court's power of supervision is warranted. Tex. Rule App. Proc. 66.3(a) & (f). Anastassov prays that this Court grant discretionary review, reverse the Opinion and Judgment of the Court of Appeals, reverse Judgment-396 and Judgment-397 and the underlying sentences, and remand the cases for a new trial.

Respectfully submitted,

Michael Mowla
P.O. Box 868
Cedar Hill, TX 75106
Phone: 972-795-2401
Fax: 972-692-6636
michael@mowlalaw.com
Texas Bar No. 24048680
Attorney for Anastassov

/s/ Michael Mowla
Michael Mowla

X. Certificate of Service

I certify that on October 8, 2020, this document was served by efile on the Dallas County District Attorney's Office to DCDAAppeals@dallascounty.org and Kimberly.Duncan@dallascounty.org; and on the State Prosecuting Attorney to stacey.soule@spa.texas.gov, john.messinger@spa.texas.gov, and information@spa.texas.gov.

/s/ Michael Mowla
Michael Mowla

XI. Certificate of Compliance

I certify that this document complies with the: (1) type-volume limitations because it is computer-generated and does **not** exceed 4,500 words. Using the word-count feature of Microsoft Word, this document contains **4,183** words **except** in the caption; identity of parties, counsel, and judges; table of contents; table of authorities; statement regarding oral argument; statement of the case, procedural history, and statement of jurisdiction; statement of grounds for review; signature; certificate of service; certificate of compliance; and appendix; and (2) typeface requirements because it was prepared in a proportionally spaced typeface using Microsoft Word in 14-point font. *See* Tex. Rule App. Proc. 9.4 (2020).

/s/ Michael Mowla
Michael Mowla

Appendix

Affirm and Opinion Filed August 12, 2020

In The
Court of Appeals
Fifth District of Texas at Dallas

No. 05-19-00396-CR and
No. 05-19-00397-CR

STOYAN K. ANASTASSOV, Appellant
V.
THE STATE OF TEXAS, Appellee

On Appeal from the 292nd Judicial District Court
Dallas County, Texas
Trial Court Cause Nos. F-1550349-V and F-1550350-V

MEMORANDUM OPINION

Before Justices Schenck, Molberg, and Nowell
Opinion by Justice Molberg

A jury convicted appellant of two charges of indecency with a child by sexual contact and sentenced him to confinement in the Texas Department of Criminal Justice's Institutional Division for nine years on one charge, three years on the other, and a $10,000 fine in each case. Appellant argues the trial court erred in allowing evidence of extraneous offenses or bad acts by appellant and alleges charge error regarding that evidence. The State also raises a cross-issue. For the reasons that follow, we affirm the judgments as modified.

BACKGROUND

On May 27, 2015, a grand jury returned two indictments charging appellant, a professional tennis coach, with indecency with a child by sexual contact, for alleged contact with S.S., one of his female students. Both indictments alleged that, with the intent to arouse and gratify his sexual desire, appellant unlawfully engaged in sexual contact with S.S., a child younger than seventeen years of age who was not then his spouse, by contacting S.S.'s genitalia (Case No. F15-50349-V) and her breast (Case No. F15-50350-V) with his hand.[1]

The State later moved to amend both indictments, seeking to change the date of the offenses charged in each indictment to on or about December 24, 2011. The trial court granted those motions. Appellant pleaded not guilty to both charges and elected to have the jury assess punishment. Both charges were tried together in a single trial beginning February 19, 2019.[2]

Nine days, eighteen witnesses, and roughly seventy exhibits later, the jury found appellant guilty of both offenses as charged in the amended indictments.

[1] Our Case No. 05-19-00396-CR involves the indictment in district court Case No. F15-50349-V, and our Case No. 05-19-00397-CR involves the indictment in district court Case No. F15-50350-V.

[2] Although the record contains no indication that the State filed a notice under penal code section 3.02(b) to prosecute the two charges in a single proceeding, the record also lacks any indication that appellant objected to the single proceeding. *See* TEX. PENAL CODE § 3.02(b); *Cervantes v. State*, 815 S.W.2d 569, 571 (Tex. Crim. App. 1991) (en banc) (while there may be a right to separate trials, the right can be waived through consent or failure to object to single trial for separate indictments).

During the guilt/innocence phase of trial, in addition to other witnesses, the jury heard from S.S. and from appellant, who waived his right not to testify. During the State's case-in-chief, S.S. testified that on Christmas Eve in 2011, appellant and others were at the home where she and her parents lived. S.S. was in the eighth grade at the time. The group ate dinner, and the adults were drinking champagne. Appellant told S.S.'s parents that he needed to go with her into the other room to discuss some ideas he had about her tennis game, and appellant took S.S. into an adjacent room, where they sat on a couch, with appellant sitting to the left of S.S.

S.S. testified appellant mentioned something about her tennis but then "got kind of sidetracked and started rambling," and "after a while he started to make sexually explicit comments and started touching me." She stated that after they talked for a while, appellant touched S.S.'s breasts, her genitals, and began open-mouth kissing her hand while saying a variety of dirty things.[3] S.S. testified appellant reached out, grabbed and squeezed her breasts with his hands over her clothes, and "reached over with his hand and laid it over my vagina and started pressing and massaging" over her clothing.

[3] Among other comments, he asked S.S. whether she was a lesbian, how many fingers she uses when she masturbates, whether she "ever had a man with foreskin," and whether she had "ever been kissed by a real man." After asking the latter question, he began French kissing her left hand and at one point also tried to kiss her neck. He also said he loved her, would never do anything to hurt her, and told her, "I don't want to end up in prison with my shit on the ceiling."

S.S. also testified about another incident in which appellant touched her genitalia over her clothes. She testified this happened in appellant's apartment, where she, appellant, and other tennis students were at the time. She testified that after the other students left the room, as appellant and S.S. sat side-by-side on his couch, watching videos for tactical purposes, appellant "briefly slid his hand over, touched my genitalia and said I'm sorry, and quickly removed his hand" and "just briefly touched and pressed and then lifted up and moved back to where he was." S.S. believed appellant "said something along the lines of, 'I'm sorry, it was an accident.'" S.S. stated that before this, the two were sitting still and that nothing was going on which would have caused this to happen accidentally.

In terms of the timing of the two genitalia-touching events (one charged, one extraneous), S.S. stated on direct examination that the incident in his apartment happened during the summer but she did not recall whether this was before or after the charged incident at Christmas. On cross-examination, she stated she believed the Christmas incident occurred first, in 2011, but was not sure, so she could not say whether the incident in appellant's apartment happened in summer 2011 or summer 2012. She later agreed on cross-examination that the first specific instance of sexual misconduct by appellant that she experienced was during Christmas of 2011.

Appellant's counsel did not object to S.S.'s extraneous-offense evidence during S.S.'s testimony and received no running objection to it before she testified.[4]

After the State rested, appellant called other witnesses. In addition to recalling S.S.'s mother, who had testified in the State's case-in-chief, appellant also testified and called three other witnesses, who generally denied seeing or hearing appellant engage in certain activity or make certain comments to S.S.

On direct-examination, appellant denied ever touching S.S. on her genitals or breasts on December 24, 2011, or at any other time, denied being alone with S.S. on December 24 or 25, 2011, and denied making certain statements and engaging in other activities that S.S. had testified about. On cross-examination, appellant admitted being at S.S.'s home on December 24, 2011, admitted having dinner there and consuming sparkling wine, and agreed there is "a certain line that has to be in place between an instructor and student." Appellant testified he always kept that line between him and his students.

Not long after that testimony, the prosecutor asked to approach the bench, and an off-the-record discussion occurred. The court then told the jury:

> Members of the jury, I'm going to give you an instruction. You'll see a similar instruction in the jury charge. The instruction will be as follows:

[4] Also, during counsel's discussions with the court outside the presence of the jury, defense counsel affirmatively indicated at least twice that he had no objection to S.S.'s extraneous-offense evidence, stating, following the State's proffer of it, "I have no objection to that, but I would like an instruction from the Court to the jury when they get there –" and later stating, "[W]e had not objected to the 404(b) material dealing with [S.S.], but we had objected to and asked for a hearing before about the 404(b) material dealing with [N.H.] and [S.T.]." N.H. and S.T. were two of appellant's other female tennis students, and their extraneous-acts evidence is at issue in this appeal.

> You are going to hear testimony consisting of alleged extraneous conduct. By extraneous conduct, I mean conduct that is something in addition to those acts that are charged in the indictments pending in this case alleged to have been committed by the defendant.
>
> You are not to consider it unless you first believe beyond a reasonable doubt that those extraneous matters, if any were committed, were committed by the defendant. And even then, even if you believe them beyond a reasonable doubt, you are only to consider them for their stated offered purpose, which is to show the defendant's motive, to show what his intent is, to show a lack of accident or a lack of mistake or to rebut a defensive theory.
>
> You may also consider it only if you believe it beyond a reasonable doubt as it relates to the relationship between the complaining witness in this case and the defendant.
>
> With that in mind, Mr. Capetillo [referring to the prosecutor], you may proceed.
>
> And please let the record reflect that the Court is going to mark this spot on the record for an opportunity to discuss matters outside the presence of the jury with both sides.

The prosecutor then asked appellant again about the line that should exist between an instructor and student, and while appellant agreed he had "crossed that line," he denied ever doing so with S.S. or S.T., another of his female students.[5]

Appellant answered several questions about other students, including female students S.T. and N.H., whose extraneous-acts evidence is at issue here. Appellant's counsel did not object to most of these questions, and appellant denied engaging in some, but not all, of the activities that S.T. and N.H. would later testify to on rebuttal.

[5] However, later during his cross-examination, he testified he "was always appropriate with his minor students" but stated he "did have an inappropriate relationship with [N.H.]." N.H. refers to the witness's initials before she was married, when her initials became N.S. We refer to her as N.H., consistent with most of the references to her in the record.

As the prosecutor questioned appellant regarding N.H., the trial court sustained appellant's objection to a question regarding appellant's marriage at the time, instructed the jury to disregard the question, and repeated the jury instruction regarding extraneous acts per a request by appellant's counsel.

Both sides called various witnesses in rebuttal, and S.T. and N.H. were among the witnesses the State called. In addition to other matters that each testified to that appellant does not complain about here (and that we therefore do not discuss), S.T. and N.H. both testified about appellant touching their bodies while they were his tennis students. For S.T., appellant complains that the State produced evidence that appellant had allegedly given her "massages that included him rubbing her buttocks."[6] For N.H., appellant complains that the State produced evidence that appellant allegedly "engaged in consensual sex acts with [N.H.], another of his tennis students, shortly before and after her eighteenth birthday, but while he was

[6] On page thirty-three of his principal brief, appellant discusses the evidence regarding S.T. and N.H. about which he complains on appeal, describing their testimony as quoted above. He cites three specific pages in the record for S.T.'s testimony. On those pages, S.T. testified about these massages and the context in which they occurred, stating that they occurred in appellant's apartment, where appellant took her to rest after S.T. had been playing tennis from early morning until around noon. S.T. testified that initially, appellant would talk to her about how her body was feeling while they were on the courts, and she stated he would "rub out my knots or something on the court" at first, but over the summer, he would then tell her they would "work on that when we get back to the house." She described the massages in the apartment as including him "massaging my butt," initially over her shorts but also under her shorts on a couple of occasions. S.T. also testified that during these massages, he would make comments about her body that made her uncomfortable, that no other students were there, and that appellant had no roommates at the time.

married."[7] Appellant's counsel did not request a limiting instruction when S.T. and N.H. testified about these matters.

After both sides closed, the court read its charges to the jury, which included the following instructions:

> You are instructed that you may not consider the defendant's commission of crimes, wrongs, or acts not alleged in the indictment, unless you first find and believe from the evidence beyond a reasonable doubt that the defendant committed such crimes, wrongs, or acts. Even then, you may only use that evidence for the limited purpose for which it was admitted, as instructed below.
>
> You are instructed that if there is any evidence before you in this case regarding other crimes, wrongs, or acts committed by the defendant against [S.S.] you may consider such evidence for its bearing on relevant matters, including the state of mind of the defendant and [S.S.], and the previous or subsequent relationship between the defendant and [S.S.].
>
> You are instructed that if there is any evidence before you in this case regarding the defendant having committed other crimes, wrongs, or bad acts, you may consider such evidence only in determining the motive, opportunity, intent, absence of mistake, lack of accident, or to rebut a defensive theory, and for no other purpose.

[7] Appellant cites to ten specific pages from the record when discussing the evidence regarding N.H. about which he complains, none of which include N.H.'s specific testimony. Instead, the pages to which he cites refer to five pages of appellant's cross-examination, two pages from appellant's redirect-examination, and three pages of his ex-wife's direct-examination by the State. Throughout most of those ten pages, appellant's counsel never objected, and that testimony is not what appellant complains about in his issues on appeal. Though he does not cite to the specific pages containing N.H.'s testimony about appellant's physical contact with her, the record reflects that N.H. testified about various conduct by appellant while N.H. was his tennis student, including that appellant talked to her about personal matters unrelated to tennis instruction, then kissed her and touched her genitals, and that they engaged in sexual intercourse after her eighteenth birthday. When appellant testified, he stated he began coaching N.H. when she was seventeen and one-half years old, admitted to touching and penetrating N.H.'s vagina and to having her touch his penis, but testified this did not occur when she was seventeen. He also admitted that he and N.H. had a sexual relationship and stated, "[W]e went all the way pretty much the first time or second time."

Following deliberations, the jury found appellant guilty of both charges and sentenced appellant to confinement in TDCJ's Institutional Division for nine years in Case No. F15-50349, three years in Case No. F15-50350, and a $10,000 fine in each of the two cases.

The trial court entered judgments which were consistent with the jury's verdicts and which indicated the sentences would run concurrently. The judgments also ordered appellant to pay court costs of $599 in each case. The judgments did not indicate that appellant was required to register as a sex offender or indicate S.S.'s age at the time of the offenses.

Following entry of the judgments, appellant filed motions for new trial, which were overruled by operation of law. Appellant also filed timely notices of appeal.

ANALYSIS

Evidence of Extraneous Offenses or Bad Acts by Appellant

In his first and third issues, appellant argues the evidence of appellant's extraneous offenses or bad acts involving S.S., S.T. and N.H. should have been excluded for prejudice and confusion under rules 403, 404(b), and 406 of the rules of evidence (first issue) and because admission of such evidence violated his right to due process (third issue). In his second issue, he argues S.S.'s extraneous-offense evidence of appellant's other touching of her genitalia was improper under Article 38.37 of the code of criminal procedure. The State argues appellant failed to preserve error in certain respects and that, in any event, no error occurred.

1. Standard of Review

We review a trial court's ruling on the admissibility of evidence for abuse of discretion. *Johnson v. State*, 490 S.W.3d 895, 908 (Tex. Crim. App. 2016). A trial court abuses its discretion if its ruling falls outside the zone of reasonable disagreement. *Id*. As long as the ruling is in the "zone of reasonable disagreement," we will affirm. *De La Paz v. State*, 279 S.W.3d 336, 343–44 (Tex. Crim. App. 2009).

2. Appellant's Failure to Preserve Error on Various Issues

Appellant complains about the admission of S.S.'s extraneous-offense evidence in his first, second, and third issues, but as noted before, he failed to object to this evidence below. Thus, he failed to preserve error for our review on those issues as they concern S.S.'s testimony, and we do not address those issues here. *See* TEX. R. APP. P. 33.1(a)(1); *Martinez v. State*, 91 S.W.3d 331, 336 (Tex. Crim. App. 2002) (the issue under rule 33.1 is "whether the complaining party on appeal brought to the trial court's attention the very complaint that party is now making on appeal") (citing *State v. Mercado*, 972 S.W.2d 75, 78 (Tex. Crim. App. 1998)).

Appellant also complains about the admission of S.T.'s and N.H.'s testimony in his first and third issues, but his objections below were limited to rule 404(b) and rule 403 grounds and did not include any objections based on rule 406. Thus, appellant failed to preserve error on the rule 406 arguments he raises in his first and third issues, and we do not address those here. *See* TEX. R. APP. P. 33.1(a)(1); *Martinez*, 91 S.W.3d at 336. Thus, because appellant failed to preserve error on

these issues, we overrule appellant's first issue as it relates to S.S.'s testimony and as it relates to his rule 406 arguments concerning S.T.'s and N.H.'s testimony, and we overrule appellant's second and third issues in their entirety.

3. S.T.'s and N.H.'s Testimony and Rules 404(b) and 403

This leaves us with appellant's first issue regarding S.T.'s and N.H.'s testimony and his arguments that the evidence should have been excluded under rules 404(b) and 403. Though appellant did not specifically mention rule 403 below, he argued that S.T.'s and N.H.'s testimony was much more prejudicial than it was probative, thus raising rule 403 issues for the trial court's consideration. *See* TEX. R. EVID. 403 (among other reasons, court may exclude relevant evidence if its probative value is substantially outweighed by a danger of unfair prejudice and confusing the issues).

In addition to objecting below, appellant also obtained an adverse ruling regarding this evidence. Before S.T. and N.H. testified, the Court stated:

> THE COURT: All right. The Court is most persuaded that the evidence that was proffered by the State that the questions they wanted to ask on cross-examination will be relevant to establish what the defendant's intent was, what his motive was, what his opportunities were to commit offenses like this, and also to eliminate in their mind the possibility that this was accidental contact or accidental touching, and also to rebut an impression that's been put before this jury that the conduct between the

> defendant as the coach and the group of students that he had was always towing [sic] the line of the proper coaching[-]student relationship.[8]

Thus, we consider whether the trial court erred under rules 404(b) or 403 in admitting S.T.'s and N.H.'s extraneous-acts evidence here.

Rule 404(b)(1) prohibits admission of evidence of crimes, wrongs, or other acts to prove a person's character in order to show that on a particular occasion the person acted in conformity with a bad character. *See* TEX. R. EVID. 404(b)(1); *Devoe v. State*, 354 S.W.3d 457, 469 (Tex. Crim. App. 2011). However, such evidence may be admissible for other purposes, such as to show proof of "motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." *See* TEX. R. EVID. 404(b)(2); *Devoe*, 354 S.W.3d at 469; *De La Paz*, 279 S.W.3d at 343 (rule 404(b)(2) is illustrative; its exceptions are neither collectively exhaustive nor mutually exclusive).

Extraneous-offense evidence may also be admissible to rebut defensive theories if a party "opens the door" to the evidence by leaving a false impression with the jury in a manner inviting the opposing party to respond. *See Williams v. State*, 301 S.W.3d 675, 687 (Tex. Crim. App. 2009) (defensive theory raised in

[8] This statement was made during a recess in appellant's testimony, during a time when the court heard, outside the presence of the jury, the parties' arguments regarding the admissibility of S.T.'s and N.H.'s evidence under rule 404(b) of the rules of evidence and N.H.'s evidence under Article 38.37 of the code of criminal procedure. *See* TEX. CODE CRIM. PROC. art. 38.37; TEX. R. EVID. 404(b). Once the hearing concluded and trial resumed, appellant's counsel continued his redirect-examination of appellant and then rested after appellant's testimony concluded. The State then called S.T., N.H., and others to testify in rebuttal.

cross-examination opened door to extraneous-offense evidence); *Dabney v. State*, 492 S.W.3d 309, 318 (Tex. Crim. App. 2016) (defensive theory raised in voir dire and opening statement opened door to extraneous-offense evidence). When a witness makes a broad statement of good conduct or character directly relevant to the offense charged, an opponent may offer extrinsic evidence rebutting the statement. *See Daggett v. State*, 187 S.W.3d 444, 453 n.24 (Tex. Crim. App. 2005).

Here, by the time the court ruled on the State's proffered testimony by S.T. and N.H., appellant's counsel had told the jury that "maybe [S.S. is] the best actress in the world," that what S.S. and her parents were saying "isn't true," that there was "bad blood" between appellant, S.S., and S.S.'s parents, and that "[t]hese people are just lying to you." Also, in addition to suggesting S.S. was fabricating these allegations, appellant's counsel had advanced a defensive theory through his questioning of various witnesses that appellant lacked the opportunity or intent to touch S.S. as she alleged and that appellant maintained a professional instructor-student relationship with S.S.

Under these circumstances, considering the similarities between the alleged touching and the relationships between appellant and S.S., S.T., and N.H.—including that all three were tennis students of appellant's within the same or similar time period and that all had been touched by appellant on typically private parts of their bodies during or in relation to their tennis instruction—we conclude the trial court did not abuse its discretion in overruling appellant's rule 404(b) objections and

allowing S.T.'s and N.H.'s testimony. *See* TEX. R. EVID. 404(b); *Bass v. State*, 270 S.W.3d 557, 562–63 & n.7 (Tex. Crim. App. 2008) (affirming trial court's decision to allow evidence under rule 404(b) of pastor's other sexual assaults of girls in church office); *Williams*, 531 S.W.3d at 919–20 (defensive theory raised in cross-examination opened door to extraneous-offense evidence); *Cornelious v. State*, No. 05-18-00274-CR, 2019 WL 1236409, at *3–5 (Tex. App.—Dallas March 18, 2019, no pet.) (mem. op., not designated for publication) (affirming court's admission of extraneous evidence over rule 404(b) objections where court could reasonably conclude evidence rebutted defensive theory of fabrication).

Next, we consider whether the court abused its discretion in allowing S.T.'s and N.H.'s testimony under rule 403. *See* TEX. R. EVID. 403. Even if evidence would otherwise be allowed under rule 404, it may be excluded under rule 403 if the probative value of the evidence "is substantially outweighed by its potential for unfair prejudice, confusing the issues, misleading the jury, undue delay, or needlessly presenting cumulative evidence." *See id.*

In making a rule 403 determination, the trial court must balance (1) the inherent probative value of the evidence and (2) the State's need for that evidence against (3) any tendency of the evidence to suggest a decision on an improper basis, (4) any tendency to confuse or distract the jury from the main issues, (5) any tendency to be given undue weight by a jury that has not been equipped to evaluate the probative force of the evidence, and (6) the likelihood that presentation of the

evidence will consume an inordinate amount of time or be needlessly cumulative. *Gigliobianco v. State*, 210 S.W.3d 637, 641–42 (Tex. Crim. App. 2006). In practice, these factors may blend together. *Id*. at 642.

We presume the trial court applied the balancing test unless the record affirmatively shows otherwise. *See Rojas v. State*, 986 S.W.2d 241, 250 (Tex. Crim. App. 1998). We also presume the probative value of relevant evidence substantially outweighs the danger of unfair prejudice from admitting the evidence. *Mozon v. State*, 991 S.W.2d 841, 847 (Tex. Crim. App. 1999). We will reverse a trial court's rule 403 determination "rarely and only after a clear abuse of discretion." *Id*.

Rule 403 favors the admission of relevant evidence and carries a presumption that relevant evidence will be more probative than prejudicial. *Gallo v. State*, 239 S.W.3d 757, 762 (Tex. Crim. App. 2007). Rule 403 envisions exclusion of evidence only when there is a "clear disparity between the degree of prejudice of the offered evidence and its probative value." *Hammer v. State*, 296 S.W.3d 555, 568 (Tex. Crim. App. 2009). In a "he said, she said" case involving sexual assault, rule 403 should be used "sparingly" to exclude relevant, otherwise admissible evidence that might bear on the credibility of the defendant or complainant. *Id*. at 562.

Here, we conclude that the trial court, after balancing the various rule 403 factors, could have reasonably concluded that the probative value of S.T.'s and N.H.'s testimony and the State's need for it were not substantially outweighed by prejudice or confusion as appellant argues or by the other dangers specified in the

rule. Considering the record here, including the lack of third-party eyewitnesses or any physical evidence, the trial court could have reasonably concluded that the first two *Gigliobianco* factors weighed heavily in the State's favor and were not substantially outweighed by the remaining four factors. On the third factor, while extraneous acts involving sexual offenses against children are inherently inflammatory,[9] the potential for an improper decision was lessened by at least two facts, including that the charged events involving S.S. were either more or comparably egregious to the extraneous events involving S.T. and N.H., and by the trial court instructing the jury regarding the proper use of the extraneous act evidence. *See Robisheaux v. State*, 483 S.W.3d 205, 220 (Tex. App.—Austin 2016, pet. ref'd) (potential for decision on an improper basis reduced when extraneous acts no more serious than allegations forming basis of indictment); *Colburn v. State*, 966 S.W.2d 511, 520 (Tex. Crim. App. 1998) (en banc) (we "generally presume the jury follows the trial court's instructions in the manner presented") (citations omitted). Thus, in light of the record here, the trial court could have reasonably concluded that if the third factor weighed against admission, it did so only slightly.

As to the fourth and fifth factors, we conclude the evidence was unlikely to confuse or distract the jury from the main issues and was unlikely to leave the jury ill-equipped to evaluate its probative force, particularly in light of the court's

[9] *See Montgomery v. State*, 810 S.W.2d 372, 397 (Tex. Crim. App. 1990) (en banc) ("Both sexually related misconduct and misconduct involving children are inherently inflammatory.").

instructions. Finally, as to the sixth factor, the presentation of the extraneous evidence from S.T. and N.H. did not take an inordinate amount of time or merely repeat evidence already submitted. *See Kimberlin*, 2019 WL 1292471, at *4 (extraneous events testimony from two witnesses encompassed a total of forty-eight pages of a two-volume record of the guilt-innocence phase).

Thus, we conclude that in balancing the applicable factors, the court could have reasonably concluded that the probative value of S.T.'s and N.H.'s extraneous-acts evidence was not substantially outweighed by unfair prejudice or confusion of the issues, and because the evidence was thus within the zone of reasonable disagreement, no abuse of discretion occurred under rule 403. *See* TEX. R. EVID. 403; *Gigliobianco*, 210 S.W.3d at 641–42 (listing factors to consider and determining court could have reasonably concluded factors weighed in favor of admitting evidence of defendant's breath test results over his rule 403 objection); *Cornelious*, 2019 WL 1236409, at *5 (affirming court's admission of extraneous evidence over rule 403 objections where court could reasonably conclude danger of unfair prejudice did not substantially outweigh its probative value).

We overrule appellant's first, second, and third issues.

Alleged Charge Error

Before the jury began deliberating in the guilt/innocence phase, the trial court read the court's charges to the jury, which included limiting instructions on the purposes for which they could consider any evidence of appellant's having

committed other crimes, wrongs, or bad acts. We include the text of those limiting instructions above in our "Background" section.

In his fourth issue, appellant argues the trial court erred in giving those instructions because they included purposes that, in his view, were not relevant to the case, including the purpose of rebutting a defensive theory, and that this error caused him sufficient harm to justify reversal.

The State argues that no error occurred because, even if the limiting instructions listed more purposes for S.T.'s and N.H.'s evidence than they should have, the court was not required to provide a more limited instruction because appellant failed to request a limiting instruction at the time S.T.'s and N.H.'s evidence was admitted and because the jury could have treated as surplusage any additional reasons that did not apply here. The State also argues that even if error occurred, reversal is not warranted because appellant was not sufficiently harmed.

We review all alleged charge error on appeal, regardless of error preservation, considering first whether error occurred, and if so, whether sufficient harm occurred to justify a reversal, an analysis that depends on whether error was preserved. *See Kirsch v. State*, 357 S.W.3d 645, 649 (Tex. Crim. App. 2012) ("The issue of error preservation is not relevant until harm is assessed because the degree of harm required for reversal depends on whether the error was preserved.") (citing *Middleton v. State*, 125 S.W.3d 450, 453 (Tex. Crim. App. 2003). If charge error has occurred and appellant preserved error on that issue below, we consider whether

"some" harm occurred, but if unpreserved charge error occurred, we will reverse only when the error results in "egregious" harm. *Nava v. State*, 415 S.W.3d 289, 298 (Tex. Crim. App. 2013); *Almanza v. State*, 686 S.W.2d 157, 171 (Tex. Crim. App. 1985) (op. on reh'g).

Based on the facts here, we conclude no charge error occurred, and even if it did, appellant has failed to show that he suffered either "some" or "egregious" harm based on this record. Because appellant failed to request a limiting instruction at the time S.T.'s and N.H.'s evidence was introduced, the trial court was under no duty to provide a limiting instruction to the jury regarding that evidence, and the evidence was admitted for all purposes. *See Delgado*, 235 S.W.3d 244, 251 (Tex. Crim. App. 2007) ("Once evidence has been admitted without a limiting instruction, it is part of the general evidence and may be used for all purposes.") (citations omitted); TEX. R. EVID. 105 (party may claim error in a ruling to admit evidence admissible for one purpose but not another "only if the party requests the court to restrict the evidence to its proper scope and instruct the jury accordingly."). In *Delgado*, when analyzing whether a trial judge should have given the jury an instruction at the guilt phase regarding the State's burden of proof for extraneous offenses, the court stated:

> Even if a limiting instruction on the use of an extraneous offense would have been appropriate here under Rule 404(b), the trial judge had no duty to include one in the jury charge for the guilt phase because appellant failed to request one at the time the evidence was offered. Because the trial judge had no duty to give *any* limiting instruction concerning the use of an extraneous offense in the guilt-phase jury

> charge, it naturally follows that he had no duty to instruct the jury on the burden of proof concerning an extraneous offense.

Delgado, 235 S.W.3d at 251.

Several of our sister courts have applied this reasoning to circumstances similar to those we face here and have found no charge error occurred regarding rule 404(b) limiting instructions when such instructions were not requested at the time the evidence was admitted. *See Hicks v. State*, No. 14-18-00794-CR, 2020 WL 3697614, at *8 (Tex. App.—Houston [14th Dist.] July 7, 2020, no pet. h.) (concluding trial court did not commit charge error by including the limiting instruction it provided when appellant did not request limiting instruction at time evidence was admitted; court did not reach question of harm because no error occurred); *Harmel v. State*, 597 S.W.3d 943, 960–61 (Tex. App.—Austin 2020, no pet.) (overruling claim of alleged charge error involving failure to give limiting instruction on extraneous offenses when appellant failed to request such instruction at time evidence was admitted; court did not consider issue of harm); *Ryder v. State*, 514 S.W.3d 391, 402–03 (Tex. App.—Amarillo 2017, pet. ref'd) (concluding court did not err by failing to instruct jury on what extraneous evidence "could not be used for" when defendant did not request limiting instruction at time evidence was introduced; court did not consider issue of harm); *Irielle v. State*, 441 S.W.3d 868, 880 (Tex. App.—Houston [14th Dist.] 2014, no pet.) (concluding no charge error occurred when defendant failed to request limiting instruction at time extraneous

evidence was admitted and explaining its decision was not due to failure to preserve error but was instead because extraneous acts evidence was admitted for all purposes—including character conformity—when appellant failed to request a limiting instruction at time evidence of extraneous acts was admitted and thus imposed no duty on trial court to give any limiting instructions in the jury charge); *Salazar v. State*, 330 S.W.3d 366, 367–68 (Tex. App.—San Antonio 2010, no pet.) (overruling appellant's claim of charge error regarding evidence of extraneous acts where appellant failed to request limiting instruction at time such evidence was admitted; court did not address question of harm).

Consistent with *Delgado* and the decisions cited above from our sister courts, because appellant failed to request a limiting instruction regarding S.T.'s and N.H.'s evidence of appellant's extraneous acts at the time their evidence was admitted, their evidence was admitted for all purposes, imposing no duty on the trial court to provide any limiting instructions in the court's charge to the jury, and leading us to conclude that the court did not err in its instructions to the jury regarding that evidence. *See* TEX. R. EVID. 105; *Delgado*, 235 S.W.3d at 251; *Hicks*, 2020 WL 3697614, at *8; *Harmel*, 597 S.W.3d at 960–61; *Ryder*, 514 S.W.3d 402–03; *Irielle*, 441 S.W.3d at 880; *Salazar*, 330 S.W.3d at 367–68. We overrule appellant's fourth issue.

State's Cross-Issue

In a single cross-issue, the State requests that we modify the judgments to reflect that appellant is required to register as a sex offender and that S.S. was

thirteen years old at the time of the offenses. Appellant did not address the State's cross-issue in his reply brief.

We may modify the trial court's judgment to make the record speak the truth when we have the necessary information to do so. TEX. R. APP. P. 43.2(b); *Bigley v. State*, 865 S.W.2d 26, 27–28 (Tex. Crim. App. 1993) (en banc) (refusing to limit the authority of the courts of appeals to reform judgments to only those situations involving mistakes of a clerical nature); *Asberry v. State*, 813 S.W.2d 526, 529–30 (Tex. App.—Dallas 1991, pet. ref'd).

In both judgments, appellant was convicted of indecency with a child by sexual contact under section 21.11(a)(1) of the penal code, an offense which subjects a person convicted of the offense to the sex offender registration requirements of chapter 62 of the code of criminal procedure. *See* TEX. PENAL CODE § 21.11(a); TEX. CODE CRIM. PROC. art. 62.001(5)(A), 62.051(a); *Crabtree v. State*, 389 S.W.3d 820, 825 (Tex. Crim. App. 2012). When a person is convicted of an offense for which registration for a sex offense is required under chapter 62, the judgment must include a statement that the registration requirements of that chapter apply to the defendant and a statement of the age of the victim. TEX. CODE CRIM. PROC. art. 42.01, § 1(27).

The judgments, however, do not indicate the sex offender registration requirements apply to appellant and do not reflect S.S.'s age at the time of the offenses. Accordingly, we sustain the State's cross-issue and modify the judgments

to reflect that Anastassov is required to register as a sex offender and that S.S. was thirteen years old at the time of the offenses.

Additional Issue Regarding Concurrent Fine and Duplicative Costs

While neither side raises this issue, we also note that the judgments imposed identical fines of $10,000 and identical court costs of $599, which, as we explain below, constituted an illegal sentence in Case No. F-1550350-V because it was inconsistent with various statutes governing multiple offenses tried together in a single proceeding.

"A trial or appellate court which otherwise has jurisdiction over a criminal conviction may always notice and correct an illegal sentence." *Mizell v. State*, 119 S.W.3d 804, 806 (Tex. Crim. App. 2003) (en banc) ("There has never been anything in Texas law that prevents *any* court with jurisdiction over a criminal case from noticing and correcting an illegal sentence.") (emphasis in original). Thus, we modify the judgment in Case No. F-1550350-V to ensure compliance with applicable law.

Section 3.03 of the penal code provides, in part:

> (a) When the accused is found guilty of more than one offense arising out of the same criminal episode prosecuted in a single criminal action, a sentence for each offense for which he has been found guilty shall be pronounced. Except as provided by Subsection (b), the sentences shall run concurrently.
>
> (b) If the accused is found guilty of more than one offense arising out of the same criminal episode, the sentences may run concurrently or consecutively if each sentence is for a conviction of:

> . . . .
>
> (2) an offense:
>
> (A) . . . under Section . . . 21.11 . . . committed against a victim younger than 17 years of age at the time of the commission of the offense regardless of whether the accused is convicted of violations of the same section more than once or is convicted of violations of more than one section . . . .

TEX. PENAL CODE § 3.03. Here, while section 3.03(b)(2)(A) would have allowed appellant's sentences to run consecutively had the court made that determination, the statute does not require it, and the trial court indicated that appellant's sentences would run concurrently. Section 3.03(a)'s concurrent sentences provision "applies to the entire sentence, including fines." *State v. Crook*, 248 S.W.3d 172, 177 (Tex. Crim. App. 2008). Additionally, "[i]n a single criminal action in which a defendant is convicted of two or more offenses or of multiple counts of the same offense, the court may assess each court cost or fee only once against the defendant." TEX. CODE CRIM. PROC. art. 102.073(a).[10]

Here, the trial court conducted a single proceeding for multiple offenses alleged to have been committed on or about December 24, 2011, and the trial court entered judgments in 2019 which imposed $10,000 fines and $599 in court costs in

[10] Although section 102.073 did not become effective until September 1, 2015, the statute applies to offenses committed before that date when the fees or costs are imposed after that date. *See Shelton v. State*, Nos. 05-17-00900-CV, 05-17-00901-CV, 05-17-00902-CV, 05-17-00903-CV, 2019 WL 244474, at *3 n.5 (Tex. App.—Dallas, Jan. 17, 2019, no pet.) (mem. op., not designated for publication) (citing Act of June 19, 2015, 84th Leg., R.S., ch. 1160, § 2, 2015 Tex. Sess. Law. Serv. Ch. 1160 (S.B. 740) (codified as TEX. CODE CRIM. PROC. art. 102.073)).

both cases. Because the sentences run concurrently and involve multiple offenses tried together in a single proceeding, the trial court could not assess multiple fines or duplicate costs in the two judgments. *See* TEX. PENAL CODE § 3.03(a); TEX. CODE CRIM. PROC. art. 102.073(a). Accordingly, we modify the judgment in Case No. F-1550350-V by deleting the $10,000 fine and the $599 in court costs. *See* TEX. PENAL CODE § 3.03(a); TEX. CODE CRIM. PROC. art. 102.073(a); TEX. R. APP. P. 43.2(b); *Bigley*, 865 S.W.2d at 27–28, 31; *Asberry*, 813 S.W.2d at 529–30.

CONCLUSION

For the foregoing reasons, we affirm the trial court's judgments, as modified below:

1) The judgments in Case No. F1550349-V and Case No. F-1550350-V are both modified to reflect that appellant is required to register as a sex offender and that S.S. was thirteen years old at the time of the offenses; and

2) the judgment in Case No. F-1550350-V is modified to delete the $10,000 fine and the $599 in court costs imposed on appellant, as those are concurrent with the fine or duplicate the costs imposed in Case No. F-1550349-V.

/Ken Molberg/
KEN MOLBERG
JUSTICE

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TEX. R. APP. P. 47

Court of Appeals
Fifth District of Texas at Dallas

JUDGMENT

STOYAN K. ANASTASSOV, Appellant	On Appeal from the 292nd Judicial District Court, Dallas County, Texas Trial Court Cause No. F-1550349-V.
No. 05-19-00396-CR V.	Opinion delivered by Justice Molberg. Justices Schenck and Nowell participating.
THE STATE OF TEXAS, Appellee	

Based on the Court's opinion of this date, the judgment of the trial court is **MODIFIED** to reflect that Anastassov is required to register as a sex offender and that S.S. was thirteen years old at the time of the offense.

As **REFORMED**, the judgment is **AFFIRMED**.

Judgment entered this 12th day of August, 2020.

Court of Appeals
Fifth District of Texas at Dallas

JUDGMENT

STOYAN K. ANASTASSOV, Appellant	On Appeal from the 292nd Judicial District Court, Dallas County, Texas Trial Court Cause No. F-1550350-V.
No. 05-19-00397-CR V.	Opinion delivered by Justice Molberg. Justices Schenck and Nowell participating.
THE STATE OF TEXAS, Appellee	

Based on the Court's opinion of this date, the judgment of the trial court is **MODIFIED** to (1) reflect that Anastassov is required to register as a sex offender and that S.S. was thirteen years old at the time of the offense, and (2) delete the $10,000 fine and the $599 in court costs imposed on appellant, as those are concurrent with the fine or duplicate the costs imposed in F-1550349-V.

As **REFORMED**, the judgment is **AFFIRMED**.

Judgment entered this 12th day of August, 2020.

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Michael Mowla on behalf of Michael Mowla
Bar No. 24048680
michael@mowlalaw.com
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Case Contacts

Name	BarNumber	Email	TimestampSubmitted	Status
Appellate DallasDA		dcdaappeals@dallascounty.org	10/8/2020 3:19:43 AM	SENT
Kimberly Duncan		Kimberly.Duncan@dallascounty.org	10/8/2020 3:19:43 AM	SENT
John Messinger		john.messinger@spa.texas.gov	10/8/2020 3:19:43 AM	SENT
Stacey Soule		stacey.soule@spa.texas.gov	10/8/2020 3:19:43 AM	SENT
TexasSPA TexasSPA		information@spa.texas.gov	10/8/2020 3:19:43 AM	SENT